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PROJECT NO. 51830

**REVIEW OF CERTAIN RETAIL
ELECTRIC CUSTOMER PROTECTION
RULES**

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**PUBLIC UTILITY COMMISSION
OF TEXAS**

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COMMENTS OF OCTOPUS ENERGY

Evolve Retail Energy LLC d/b/a Octopus Energy (Octopus Energy) files these comments in response to the request of the Staff of the Public Utility Commission of Texas (Commission or PUCT) filed in this proceeding on June 25, 2021.

Octopus Energy started as a Retail Electric Provider (REP) in ERCOT in 2019 as Evolve Energy which was renamed as Evolve Retail Energy. In 2020, Octopus Energy, based in the UK, purchased Evolve Retail Energy, and the Commission approved the company's name change just after Winter Storm Uri on February 22, 2021. Octopus Energy's US offices are located in Houston, Texas. Globally, Octopus Energy provides service in the UK, Germany, Japan, and Australia. While it has only been around 5 years, Octopus Energy serves over 2 million customers globally and has been significantly expanding its operations in ERCOT.

As part of its global mission, Octopus Energy prides itself on exceptional customer service. In response to Winter Storm Uri, Octopus Energy was the first energy provider to voluntarily announce a Bill Forgiveness program, which helped its customers recover due to fluctuations in wholesale prices on the Texas energy grid. Subsequently, Octopus Energy was named the 2020 Retail Energy Provider of the Year by Energy Marketing Conferences. Octopus Energy's commitment to customer service is further demonstrated by its 4.8-star rating with approximately 58,000 reviews on trustpilot.com. Octopus Energy was actively engaged in the legislative process relating to House Bill 16.¹ It was clear from the filing of the bill and throughout its consideration

¹ Act of May 12, 2021, 87th Leg., R.S., ch. 132 (HB 16) (hereinafter "HB 16").

that proposed Utilities Code Section 39.110 was aimed at preventing aggregators, brokers, and REPs (like Griddy) from offering to or enrolling residential and small commercial customers in products that pass through to these commercial customers prices that are 100% indexed to the wholesale real-time market.² As a result, the Commission's implementation of this new Section should be similarly targeted.

EXECUTIVE SUMMARY

1. **Clarify Proposed Substantive Rule § 25.475(c)(3)(G):** As noted above, when it enacted Section 39.110, Utilities Code, the Legislature intended to prevent aggregators, brokers, and REPs from offering or selling to residential and small commercial customers products that pass through to those customers prices that are 100% indexed to the wholesale real-time market. Since the end of the regular legislative session, though, there has been increasing discussion about the need to ensure that customers are encouraged to respond to tight conditions on the grid in order to support reliable operations of the grid. Better customer visibility to wholesale prices and the opportunity for customers to receive direct financial or other benefits from responding to price signals, without being 100% indexed to real-time prices, will encourage the growth of demand response in ERCOT without the need for additional regulatory programs. In order to strike a balance between the Legislature's intent and improving grid reliability, the Commission should be targeted in its implementation of HB 16 rather than take a broad and expansive approach. Accordingly, the Commission should clarify proposed changes to Substantive Rule §25.475(c)(3)(G) to avoid

² House State Affairs Committee Report, Bill Analysis, Background and Purpose, Tex. C.S.H.B. 16, 87th Leg., R.S. (Mar. 23, 2021); and Senate Research Center, Bill Analysis, Author's/Sponsor's Statement of Intent, Tex. C.S.H.B. 16, 87th Leg., R.S. (Apr. 22, 2021).

potential unintended consequences and broader prohibitions than Section 39.110, Utilities Code, requires.

2. Clarify Proposed Substantive Rule §25.475(e)(3)(A): Octopus Energy supports increased transparency and notice to customers regarding the termination of contracts for fixed rate products. Customers should be encouraged to actively shop for products that meet their needs rather than lulled into an inadvertent enrollment in a high priced contract for retail electric service. In order to adequately notify customer of the potential prices that will apply if they fail to choose a new electric product, the Commission should further clarify Substantive Rule §25.475(e)(3)(A) to require a REP to provide on a monthly basis clear notice of the price applicable to a default renewal product before that product goes into effect for a customer each month.

3. Reject Proposed Changes to Substantive Rule §25.475(b)(5 and 8): The Commission should exercise caution in unduly limiting the ability of REPs to recover the costs of ancillary services. There is a potential that over-regulation on this issue can impose a discriminatory impact on REPs that are not affiliated with generators in ERCOT. The Commission should remove proposed changes to Substantive Rule §25.475(b)(5 and 8).

4. Improved Pricing for Provider of Last Resort Service: If the Commission reconsiders its approach to pricing for Provider of Last Resort (POLR) service in the ERCOT region, Octopus Energy recommends that the Commission consider a more customer-friendly and pro-competition approach to this service by requiring potential providers to bid to serve the customers that need this service and the Commission selecting the best offer. This approach is used in other competitive energy markets and ensures that customers that are subject to an involuntary transition are protected as much as possible from unexpected price increases.

COMMENTS

1. Wholesale Indexed Products – Clarification to § 25.475(c)(3)(G)

As discussed above, when it approved HB 16, the Legislature was very specific regarding the retail product that it intended to prohibit being offered to residential and small commercial customers:

(a) In this section, "wholesale indexed product" means a retail electric product in which the price a customer pays for electricity includes a direct pass-through of real-time settlement point prices determined by the independent organization certified under Section 39.151 for the ERCOT power region.

(b) An aggregator, a broker, or a retail electric provider may not offer a wholesale indexed product to a residential or small commercial customer.³

As the plain language of HB 16 and the legislative history referenced above make clear, the Legislature did not intend to impact the availability of all indexed products to residential and small commercial customers.

While many of the changes the Commission has proposed to Substantive Rule §25.475 are consistent with the Legislature's direct and express intent, one provision appears to have a broader impact. In particular, the structure of proposed §25.475(c)(3)(G) (that is focused on ensuring that customers that enroll in products that contain a direct pass-through of ancillary service charges receive a particular acknowledgement of risk (AOR) notification) could be interpreted to prohibit a REP, aggregator, or broker from enrolling a residential or small commercial customer in *any* indexed product or any other product that contains a direct pass-through of ancillary service charges – even if the REP, aggregator, or broker provides an AOR notification. This prohibition

³ HB 16 at page 1, lines 6-14.

exceeds the requirements of HB 16, and Octopus Energy recommends the Commission clarify this subsection to avoid this result as follows:

- (G) A REP, aggregator, or broker may enroll a customer~~[, including a customer other than a residential or small commercial customer, in an indexed product or]~~ in a product that contains a direct pass-through of ancillary service charges only if the REP, aggregator, or broker obtains before the customer's enrollment ~~[and]~~ an AOR in compliance with the requirements of this section.

These proposed revisions also would make this subsection consistent with the provisions of proposed Substantive Rule §25.475(j)(3) and make clear that this AOR notice must be provided in all appropriate instances.

2. The Commission Should Require Increased Transparency to Customers

Octopus Energy is deeply committed to customer transparency as the cornerstone to a well-functioning competitive market. Octopus Energy strongly supports the Commission's proposed changes to the notice a REP must provide to a customer regarding the termination of a fixed rate product. During the Legislative Session, legislators expressed concern that customers can be surprised by a rate change when their fixed rate contract expires and they are switched to a variable rate plan as a default service. This concern is not unfounded, as reflected in the Commission's statistics showing that billing issues are the primary customer complaint.⁴ Ensuring that a customer receives clear notice regarding the termination of a fixed rate product and the charges that the customer will pay in the event they do not select another retail product is critical to helping customers avoid enrollment in a default renewal product with higher rates than they might expect.

While the Commission's proposed revisions to Substantive Rule §25.475 reflect the timing of the notice that a REP must provide pursuant to HB 16, the proposed revisions fall short of requiring a REP to provide a customer adequate information regarding the impact of that

⁴ See Customer Complaint Statistics (texas.gov) (12/31/20-6/30/21).

termination, especially the impact that a customer may experience if the customer does not act in response to the notice. To provide additional clarity to customers, Octopus Energy recommends that the Commission's rules require the REP to provide notice of the *actual price* the customer will pay if they default to the renewal product. A customer should not have to calculate the price based on terms provided by the REP as proposed by Substantive Rule §25.475(e)(3)(A). Rather, the REP should provide notice of the *actual price* that the customer will pay not later than 24 to 72 hours before the rate will become applicable to the customer's consumption. And since the default renewal product may have a different price from month to month, the REP should provide this notice of the price for continued service before the start of each subsequent month. This clear, transparent approach will ensure that customers are not caught off guard by unexpected price changes under the default renewal product.

To require this additional clarity and transparency to customers, the Commission should add an additional requirement to proposed Substantive Rule §25.475(e)(3)(A) that provides, "Not less than 24 hours prior to when a customer will become liable for charges pursuant to a default renewal product, the REP must provide the customer notice of the price that will apply to the customer's renewal product for the upcoming month. If the price changes from one month to the next, the updated price for the next month's service also should be provided at least 24 hours prior to the time when the new price will become effective." This notification should apply not only prospectively, but also to customers who previously transitioned to a default month to month product from a fixed rate contract.

Octopus Energy also recommends the Commission clarify proposed Substantive Rule §25.475(c)(3)(E) regarding how long a REP must continue to serve a customer under the pricing terms of a fixed rate product in the event the REP makes an error in providing the expiration notice

during the last third of the customer's fixed rate contract period. In the event of shorter duration contracts, the extended service may not be significant – potentially up to three months for a one year term product. But, based on the provisions of proposed Substantive Rule §25.475(e)(2), in the event of longer, multi-year term products, extending service at the same fixed rate as the original term to ensure notice equal to the last one-third of the original term could require an extension of more than one year for a contract with an initial term of more than three years. In the event the price charged pursuant to the terminating product is now above current market pricing, this automatic extension may actually be contrary to a customer's best interest. In order to balance provision of sufficient expiration notice and the potential that an extension of the current contract may not be in a customer's best interest, the Commission should revise Substantive Rule §25.475(e)(2)(D) to read as follows:

- (D) If a REP does not provide the required notice of the expiration of a customer's contract and the customer does not select another retail electric product before expiration of the contract term, the REP must continue serving the customer under the terms of the fixed rate contract until sufficient expiration notice is provided ~~[and]~~ during a period of up to three months or until the customer selects another retail electric product.

3. Over-Regulation of Ancillary Service Charges

In proposed changes to Substantive Rule §25.475(b), the Commission has proposed (1) a requirement that fixed rate products must include the cost of ancillary services within the fixed price so that any flow-through of ancillary services costs will disqualify a product as a "fixed rate product" (subpart 5); and (2) that the "price" for a retail product must include the cost for ancillary services (subpart 8). Octopus Energy does not flow-through ancillary service costs to customers that have signed up for the company's fixed rate products. However, as the market saw during Winter Storm Uri, there is a potential for dramatic price increases in the cost of ancillary services. Moreover, the Commission is considering whether there should be changes to the types and cost

allocation of ancillary services in the ERCOT market. Both of these dynamics are resulting in an increased level of uncertainty surrounding ancillary services in ERCOT. As a result, Octopus Energy respectfully recommends that the Commission remove these two proposed changes.

In general, the cost of a REP's share of ancillary services is not significant, but the actual amount that a REP must pay is uncertain and difficult to hedge. The allocated share of ancillary services that a REP is responsible for is subject to after-the-fact re-allocations due to uncontrollable changes in the market, such as a dramatic reduction or increase of industrial load in one month compared to the prior month. These re-allocations are due, in large part, to the fact that approximately 30% of the load in ERCOT – primarily large industrial load – is not served through smart meters. Once ERCOT receives the meter reads for these customers up to a month after the fact, ERCOT may have to re-adjust all load-serving entities' allocation of ancillary service costs for a prior month, which significantly undermines the ability of a REP to hedge this potential expense. Before the Commission requires a REP to commit to charging its retail customers for a certain amount of ancillary services, the Commission must ensure that all loads in the ERCOT market are served by smart meters so that ERCOT has more real-time access to customer usage data and can more accurately allocate responsibility for ancillary services every month.

In addition, the cost a REP will be charged for ancillary services is difficult to hedge because there is not a liquid hedge market for these services. For REPs that are not affiliated with generation resources, and therefore do not have a natural intra-corporate hedge for ancillary services, the difficulty in hedging the cost of ancillary services can have a disproportionately adverse financial impact.

One way to mitigate the difficulty in projecting the magnitude of ancillary service responsibility and the cost of that responsibility is to allow REPs the option to pass through to

retail customers the cost and allocated volume of ancillary charges. (Octopus Energy strongly supports ensuring that customers are properly notified of this provision in their contracts and therefore does not object to the Commission's proposed notification to customers when the product a customer has selected contains this direct pass-through.) If such pass-throughs are never allowed for what otherwise would be fixed rate products, the result of the Commission's proposed changes could be to essentially allow only REPs that are affiliated with generators to offer fixed rate products. Only those REPs will have a natural hedge within their corporate family that can address to a significant extent the financial impact of both of these variables. Rather than inadvertently limiting competition in the retail market, Octopus Energy respectfully recommends that the Commission reject the strawman rule's proposed changes to Substantive Rule §25.475(b)(5 and 8).

4. Improved Pricing for Provider of Last Resort Service

In the preamble to its Strawman Rule, Commission Staff requested comments regarding 16 TAC §25.43 and if the Commission removes the Real-Time Settlement Point Price (RTSPP) as a component of the rate a Provider of Last Resort (POLR) may charge, what would be an equitable approach to the POLR pricing moving forward. Octopus Energy recommends that the Commission consider a more customer-friendly and pro-competition approach to POLR service by requiring potential providers to bid to serve the customers that need this service and then selecting the best price offer to serve those customers similar to the Supplier of Last Resort process used in the UK.

CONCLUSION

Octopus Energy appreciates the opportunity to provide these comments and looks forward to working with the Commission and interested parties on these issues.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael J. Jewell", with a long horizontal line extending to the right.

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